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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 146

TEXAS STATE LIFE INSURANCE COMPANY, ET AL., PETITIONERS

v.

SEBE J. HOUGHTON, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the District Court of the United States for the Northern District of Texas (R. 50-55) is reported at 68 F. Supp. 21. The opinions in the United States Circuit Court of Appeals for the Fifth Circuit (R. 58-62) are reported at 166 F. 2d 848.

JURISDICTION

The judgment of the United States Circuit Court of Appeals for the Fifth Circuit was en-

tered on March 1, 1948 (R. 62). A petition for rehearing was denied on April 15, 1948 (R. 66). The petition for a writ of certiorari was filed on July 9, 1948. The jurisdiction of this Court was invoked under Section 240(a) of the Judicial Code as amended (now 28 U. S. C. 1254).

QUESTIONS PRESENTED

1. Whether a person who is director and president of a corporation, subject to annual elections, but who performs special duties of an executive and managerial character and receives special compensation for his services, may occupy "a position, other than a temporary position, in the employ of any employer" within the meaning of Section 8(b) of the Selective Training and Service Act.

2. Whether under the circumstances of the particular case it was impossible or unreasonable to restore respondent to a position with status and pay comparable to the position he occupied when he was ordered into military service.

STATUTE INVOLVED

The pertinent portions of Section 8 of the Selective Training and Service Act of 1940 (54 Stat. 885; 50 U. S. C. App. 308) provide as follows:

> (a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes

his period of training and service under section 3(b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. * * *

(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

* * * * *

(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

* * * * *

STATEMENT

Respondent brought this suit under Section 8(e) of the Selective Training and Service Act of 1940 (50 U. S. C. App. 308(e)) for restoration to the position he held in petitioners' employ at

the time he entered military service, or one of like seniority, status, and pay, and for compensation for damages resulting from petitioners' refusal (R. 6). Relief was denied in the district court (R. 13), but this judgment was reversed on appeal (R. 62).

Petitioners are a Texas insurance corporation doing business in Texas and the directors of the corporation (R. 3). Respondent was a director and president of the corporation at an annual salary of $4,800 when he entered military service on April 23, 1942 (R. 50). Under applicable Texas law, an insurance company is required to be managed by not fewer than seven directors, all of whom shall be stockholders of the company, and the directors are required to elect from among themselves the president and such other officials as the bylaws may require (R. 50, 60). After respondent went into military service, the vice president acted as president until the next stockholders' meeting when he was elected president (R. 52). Respondent satisfactorily completed his period of active duty on December 15, 1945, and on March 11, 1946, applied for restoration to the positions he had previously occupied or to a position of like seniority, status, and pay, which was refused (R. 5, 8).

Petitioners contended that the positions, being annually elective offices, were not "position[s], other than a temporary position in the employ of any employer" within the meaning of Section

8(b) (R. 8), and further that it was impossible or unreasonable to restore respondent because the company had been reorganized during his absence, its capital stock increased, a new and different type of policy was being offered, and a change in the conduct of the business, to which respondent had objected, was now in effect (R. 50-51). It was also asserted that respondent, while in office, had engaged in numerous controversies with the state board of insurance commissioners to the detriment of the company, and that restoration of respondent would result in similar controversies and serious losses to the company, and that he was not qualified or able to perform the duties of his previous position because he disagreed with the present method of operation of the business and was not qualified to be restored as president since he had not been elected a director of the corporation (R. 51).

Despite respondent's controversies with the state insurance authorities and the differences of opinion between him and the board of directors, he had been reelected president shortly before his call to military service (R. 29, 52). He had been a founder of petitioner corporation and its predecessor and at the time he began service in the Army he had held the position of president or executive vice president of the company for more than nine years (R. 20).

Without passing upon respondent's views with respect to the operation of the company or his disagreement with others in this connection, the

district court denied relief on the ground that it would be "unreasonable" within the meaning of the Act to require restoration to a position required to be elective under state insurance laws (R. 54). The circuit court of appeals reversed and remanded, one judge dissenting, and held that although the position of director or president of a corporation alone, without special duties or compensation, would probably not be a position to which restoration was required, respondent was entitled to be restored since he "had executive and managerial duties, and was paid a salary of $4,800 per year" (R. 60). The court further ruled that respondent's employment was not temporary, although it was limited in time to one year and was conditioned upon reelection each year (R. 60). The court reasoned that no "impossibility" was involved since it would have been possible for the respondent to have been elected a director and president and his views on policies were subject to the control of the board of directors (R. 61). In any event, it was held, he could have been denied the presidency and have been given some other position with like status and pay (R. 61). Since the position occupied was limited to one year and the year had already elapsed, the court ruled that respondent should recover a year's salary if no better total defense were advanced in further proceedings (R. 61).

ARGUMENT

The decision of the court below does not present a conflict and does not raise any question of general importance in the administration of the Selective Training and Service Act. Although the question whether an officer or director of a corporation is entitled to restoration has arisen on a few occasions, the decisions have consistently recognized that each case must rest on its particular facts. *Trusteed Funds* v. *Dacey,* 160 F. 2d 413 (C.C.A. 1); *John S. Doane Co.* v. *Martin,* 164 F. 2d 537 (C.C.A. 1); *Van Doren* v. *Van Doren Laundry Service,* 162 F. 2d 1007 (C.C.A. 3); *Campbell* v. *Radio-Television Institute, Inc.,* 12 Labor Cases ¶ 63-682, decided March 31, 1947 (S.D.N.Y., not officially reported); *McClayton* v. *W. B. Cassell Company,* 66 F. Supp. 165 (D. Md.). These decisions agree that restoration to an elective position as officer or director of a corporation is probably not required, but make clear that the right of a particular individual to reinstatement will depend upon his relationship to the company and the duties he is expected or required to perform. "We do not think that because the veteran held an elective office in addition to his other work he should therefore be deprived of all of his reemployment rights." *John S. Doane Co.* v. *Martin, supra,* at p. 541. It is also clear that a person will not be deemed to hold a temporary position merely because his office has a fixed term. The character of the position

will depend upon the length of an employee's association with the firm and other factors. *Trusteed Funds* v. *Dacey, supra; Van Doren* v. *Van Doren Laundry Service, supra; McClayton* v. *W. B. Cassell Co., supra.*

The court below gave full effect to the foregoing principles. It assumed that "being merely a director of a corporation, or its president without special duties or compensation, would probably not be" a position to which restoration was required (R. 60). Respondent's right to reinstatement was based specifically upon his "executive and managerial duties" and the fact that he "was paid a salary of $4,800 per year" (R. 60). The determination that respondent's position was not temporary is clearly supported by his more than nine years of service as well as by his participation in the founding of the company (R. 20, 60). The charges with respect to respondent's conduct in office were not finally disposed of by either of the lower courts and their effect on unreasonableness or impossibility of reemployment should not be decided for the first time by this Court.[1] The two decisions from which petitioners quote, read in their entirety, are in accord with the principles referred to above and furnish no support for petitioners' suggestion of a conflict.

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[1] As pointed out previously, the judgment below remanded the cause for further proceedings (R. 61).

CONCLUSION

Since there is no conflict of decisions and no question of general importance is involved, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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